STATE OF MICHIGAN

IN THE SUPREME COURT

CITY OF HOLLAND,

Plaintiff-Appellee,

v

CONSUMERS ENERGY COMPANY,

Defendant-Appellant.
/

Supreme Court No. 151053

Court of Appeals No. 315541

Ottawa County Circuit Court
No. 12-002758-CZ

Hon. Edward R. Post

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CONSUMERS ENERGY COMPANY'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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RESTATEMENT OF QUESTIONS PRESENTED

1. This Court in *Great Wolf Lodge of Traverse City, LLC v Public Service Commission*, 489 Mich 27; 799 NW2d 155 (2011), interpreted Michigan Public Service Commission Rule 411 to prohibit a municipal utility from providing electric service to the premises of a customer first served by a Commission-regulated public utility. *Great Wolf Lodge* arose in the context of a lawsuit filed by an electric customer. Does the *Great Wolf Lodge* holding also apply when it is the municipal utility that files suit?

Court of Appeals says:	No
Trial court says:	No
Plaintiff City of Holland says:	No
Defendant Consumers Energy Company says:	Yes

2. MCL 124.3(2) prevents a municipal utility from "render[ing] electric delivery service . . . to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing." Can a customer and municipal utility avoid MCL 124.3(2)'s prohibition based on a brief break in service?

Court of Appeals says:	Yes
Trial court says:	Yes
Plaintiff City of Holland says:	Yes
Defendant Consumers Energy Company says:	No

STATUTES AND RULES INVOLVED

MCL 124.3(2) states:

> A municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing. [MCL 124.3(2).]

MCL 460.10y states, in relevant part:

> **Municipally owned utilities; alternative electric suppliers; delivery services**
>
> * * *
>
> (2) Except with the written consent of the municipally owned utility, a person shall not provide delivery service or customer account service to a retail customer that was receiving that service from a municipally owned utility as of June 5, 2000, or is receiving the service from a municipally owned utility. For purposes of this subsection, "customer" means the building or facilities served rather than the individual, association, partnership, corporation, governmental body, or any other entity taking service.
>
> (3) With respect to any electric utility regarding delivery service to customers located outside of the municipal boundaries of the municipality that owns the utility, a governing body of a municipally owned utility may elect to operate in compliance with R 460.3411 of the Michigan administrative code, as in effect on June 5, 2000. However, compliance with R 460.3411(13) of the Michigan administrative code is not required for the municipally owned utility. Concurrent with the filing of an election under this subsection with the commission, the municipally owned utility shall serve a copy of the election on the electric utility. Beginning 30 days after service of the copy of the election, the electric utility shall, as to the electing municipally owned utility, be subject to the terms of R 460.3411 of the Michigan administrative code as in effect on June 5, 2000. The commission shall decide disputes arising under this subsection subject to judicial review and enforcement. [MCL 460.10y.]

Michigan Administrative Code Rule 460.3411 (Rule 411) states:

> **Extension of electric service in areas served by 2 or more utilities.**
>
> Rule 411. (1) As used in this rule:
>
> (a) "Customer" means the buildings and facilities served rather than the individual, association, partnership, or corporation served.
>
> (2) Existing customers shall not transfer from one utility to another.
>
> * * *
>
> (11) The first utility serving a customer pursuant to these rules is entitled to serve the entire electric load on the premises of that customer even if another utility is closer to a portion of the customer's load.
>
> * * *
>
> (14) Regardless of other provisions of this rule, except subrule (9), a utility shall not extend service to a new customer in a manner that will duplicate the existing electric distribution facilities of another utility, except where both utilities are within 300 feet of the prospective customer. Three-phase service does not duplicate single-phase service when extended to serve a 3-phase customer. [Mich Admin Code, R 460.3411.]

INTRODUCTION

Michigan Public Service Commission Rule 411(11) (Mich Admin Code, R 460.3411) gives a regulated utility that is "the first utility to provide electric service to buildings and facilities" on a parcel "the right to serve the entire electric load on the premises," and that "right" is "unaffected by subsequent changes in the customer" or even "destruction of the buildings and facilities." *Great Wolf Lodge of Traverse City, LLC v Pub Serv Comm'n*, 489 Mich 27, 41; 799 NW2d 155 (2011). This right of first entitlement is reiterated in MCL 124.3(2), which prohibits a municipal utility like the City of Holland from rendering electric delivery service to "customers outside [the municipality's] corporate limits already receiving the service from another utility unless the serving utility consents in writing." The purpose of these twin rules is simple: to protect the public's investment in the electric grid and avoid needless duplication of electric facilities.

It is undisputed here that Consumers Energy, a regulated utility, first installed electric facilities in 1939 to serve the subject parcel on Riley Street. Consumers Energy was still serving the Riley Street parcel in 2012 when—without seeking Consumers Energy's consent— the City approached the customer, Benjamin's Hope, and undercut Consumers Energy's pricing, eating the cost of installing the duplicate facilities necessary to connect the parcel to the City's network. Benjamin's Hope directed Consumers Energy to terminate service, and seven days after Consumers Energy complied, the City began providing electric service.

The reasoning of *Great Wolf Lodge* dictates the outcome here: a customer "may not circumvent the limitations of Rule 411(11) by attempting to receive service from a municipal corporation not subject to PSC regulation." 489 Mich at 42. Otherwise, "the utility's right of first entitlement . . . [is] subject to unilateral abrogation," *id.* at 40 n 22, and results in the senseless duplication of electric facilities that Rule 411 and MCL 124.3(2) are intended to preclude.

The City's position is that Rule 411 does not apply to municipal utilities or electric customers. But all seven Justices in *Great Wolf Lodge* applied the utility's right of first entitlement to a customer, and the logic applies equally to a municipal utility. (In fact, the competitor in *Great Wolf Lodge* was a municipal utility.) If the City is correct, a regulated utility's right of first entitlement is a nullity, because while the utility would have a theoretical right to continue servicing an electric customer, the utility would have no way to *enforce* that right against a customer or competing municipal utility. The result would be precisely what happened here—the duplication of electric facilities Rule 411 is supposed to prevent.

This Court should reaffirm *Great Wolf Lodge* and Rule 411's applicability to customers and municipal utilities. Just because Rule 411 governs MPSC-regulated utilities does not mean the Rule does not *affect* others. For example, MPSC Rule 409(1) (Mich Admin Code, R 460.3409) requires a customer to prevent tampering with utility-owned equipment on the customer's premises and gives the regulated utility the power to cut off service if such tampering takes place. Under the City's position, a customer could tamper with no repercussion, because MPSC rules do not apply to customers. Similarly, under Rule 408 (Mich Admin Code, R 460.3408), when a regulated utility renders temporary service to a customer, the utility "shall require that the customer bear the cost of installing and removing the utility-owned equipment." Under the City's theory, the utility could so require, but the customer would not have to comply because MPSC rules do not affect customers. What the City overlooks is MCL 460.557(6), which grants the MPSC broad power to promulgate rules for "the proper discharge of its functions under" Michigan's Transmission of Electricity Act, including "the rules and conditions of service under which [ ] electricity shall be transmitted and distributed." MCL 460.551.

This Court should reaffirm a regulated utility's right of first entitlement, reverse the Court of Appeals, and enter judgment in favor of Consumers Energy.

SUMMARY OF FACTS

Consumers Energy provided a comprehensive statement of facts and proceedings in its application for leave and reply brief. The basic facts are straightforward and undisputed:

- Consumers Energy first installed electric facilities to the Riley Street property in 1939 and supplied the property with electricity for many decades. (Appl 3.)
- After a three-year period in which the Riley Street parcel apparently did not require electricity, Consumers Energy resumed service in September 2011 to a construction trailer on the premises, sending bills to its customer, Benjamin's Hope, which had purchased the property. (Appl 3-4.)
- Although Benjamin's Hope was a current customer of Consumers Energy, the City of Holland contacted Benjamin's Hope sometime in January 2012 without first seeking Consumers Energy's consent. (Appl 4.) To provide a more competitive bid, the City chose to pass on to other customers the $65,050 necessary to duplicate Consumers Energy's electric facilities and connect the City's network to the property, rather than charge Benjamin's Hope. (Reply Br 3.)
- Based on the City's artificially low bid, Benjamin's Hope entered into a contract with the City on January 25, 2012. (Appl 4.) Benjamin's Hope removed the construction trailer and directed Consumers Energy to discontinue service. (*Id.*) Consumers Energy complied. (*Id.*) Seven days later, the City began providing electricity to other buildings on the same Riley Street parcel. (*Id.*)

SUPPLEMENTAL ARGUMENT

I. A regulated utility's right of first entitlement is meaningless if municipal utilities can freely conspire to circumvent that right.

A. Rule 411 vests a regulated utility with a right of first entitlement; *Great Wolf Lodge* ensures that right has meaning by holding that the utility's customer cannot circumvent that right by cutting a deal with a municipal utility.

The City agrees that *Great Wolf Lodge* interpreted Rule 411(11) to mean that "the first [regulated] utility ever to provide service to a premises obtains the exclusive and perpetual right to provide all service to that premises in the future." (City Resp to Appl 1.) This right of first entitlement is intended "to avoid unnecessary and costly duplication of [electric] facilities and to provide objective standards for extension of electric service." *Great Wolf Lodge*, 489 Mich. at 38 (quotation omitted).

In *Great Wolf Lodge*, it was "undisputed that Cherryland [Electric] was the first utility to provide electric service to buildings and facilities" on the subject parcel. 489 Mich at 41. So Cherryland had "the right to serve the entire electric load on the premises," a right "unaffected by subsequent changes in the 'customer.' " *Id.*

Like the City of Holland here, the plaintiff customer in *Great Wolf Lodge* asserted that it was not bound by Rule 411, because it was not a regulated utility. Not a single Justice accepted that proposition. As the *Great Wolf Lodge* majority held, a customer "may not circumvent the limitation of Rule 411(11) by attempting to receive service from a municipal corporation not subject to PSC regulation." 489 Mich at 42. Any other approach "leaves the utility's right of first entitlement undefined, wholly outside the control of the utility and the PSC, and subject to unilateral abrogation by property owners." *Id.* at 40 n 22.

The municipal utility attempting to poach Cherryland's customer in *Great Wolf Lodge* was technically not a party to that litigation. But the Michigan Municipal Electric Association submitted an *amicus* brief, filed by the same law firm—indeed, the two same attorneys—that represent the City here. And Section II.B2 of that *amicus* advanced the very same argument the city advances here, namely, that "Rule 411 Is Not Applicable To a Municipal Utility." (MMEA Amicus Br in Nos. 139541-2 & 139544-5, at 8.) Again, not a single Justice accepted that position. In the words of the *Great Wolf Lodge* majority, the regulated utility, Cherryland, was "entitled to the benefit of the first entitlement in Rule 411(11)," 489 Mich at 41, even though the competitive utility was municipal and thus not subject to MPSC regulation:

> [I]t is *irrelevant* that [Traverse City Light & Power] is a municipal corporation not subject to PSC regulation. Rule 411(11) grants and limits rights. . . . Plaintiff may not circumvent the limitation of Rule 411(11) by attempting to receive service from a municipal corporation not subject to PSC regulation. [*Id.* at 41-42 (emphasis added).]

Consumers Energy does not dispute that the Public Service Commission lacks jurisdiction over the City of Holland. But that fact is irrelevant to Consumer Energy's right to exclude other electric providers under its right of first entitlement. A holding by this Court that a municipal utility and a customer can freely circumvent Rule 411 would make a regulated "utility's right of first entitlement . . . subject to unilateral abrogation by property owners." *Great Wolf Lodge*, 489 Mich at 40 n 22. The whole purpose of Rule 411(11) was to grant the "utility first serving buildings or facilities on an undivided piece of real property the *right* to serve the entire electric load on that property." *Id.* at 39 (emphasis added). But that right cannot be contingent on the fortuity of a customer bringing suit against the regulated utility in an administrative proceeding. This Court should explicitly extend *Great Wolf Lodge* to municipal utilities and reaffirm regulated utilities' right of first entitlement.

B. The Court should decline the City of Holland's invitation to overrule *Great Wolf Lodge*.

The City candidly concedes that the logic of *Great Wolf Lodge* requires a ruling in favor of Consumers Energy here: "If landowners (i.e., prospective customers) are bound by Rule 411(11), then municipal utilities are effectively bound as well." (City Resp to Appl 8.) So the City and its *amici* make the bold request that this Court overrule *Great Wolf Lodge*: "the Court should use this opportunity [sic] clarify the erroneous references in the *Great Wolf Lodge* case which spawned this litigation." (*Id.* at 7-8; accord Compl ¶¶ 40-41.) This Court should reject that request for two basic reasons.

To begin, this Court adheres to *stare decisis*. *Driver v Naini*, 490 Mich 239, 257 n 65; 802 NW2d 311 (2011). That doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* (quoting *Hohn v United States*, 524 US 236, 251 (1998)).

The City does not even attempt to identify any extraordinary circumstances that provide the "special justification" necessary to overrule a prior decision. *Arizona v Rumsey*, 467 US 203, 213 (1984). Such justifications include "subsequent changes or development in the law" that undermine a prior decision's rationale, *Patterson v McLean Credit Union*, 491 US 164, 173 (1989); the need "to bring [a decision] into agreement with experience and with facts newly ascertained," *Burnet v Coronado Oil & Gas Co*, 285 US 393, 412 (1932); or a precedent's becoming a "detriment to coherence and consistency in the law," *Patterson*, 491 US at 173. This Court decided *Great Wolf Lodge* a mere four years ago and did so by rejecting the very argument the City makes here. The law has not changed, new facts have not been ascertained, and *Great Wolf Lodge* has been an easy-to-follow rule that enforces a regulated utility's right of first entitlement. The Court should decline the City's request to overrule *Great Wolf Lodge* and should instead accept the City's contention that *Great Wolf Lodge*'s logic requires reversal here.

More important, the City is wrong when it argues that Rule 411 can have no impact on any person or entity aside from regulated utilities. The Michigan Public Service Commission's power to promulgate rules flows from, among other things, MCL 460.557(6), which grants the MPSC broad power to promulgate rules for "the proper discharge of its functions under" Michigan's Transmission of Electricity Act. Those functions expressly include "the rules and conditions of service under which [ ] electricity shall be transmitted and distributed." MCL 460.551. Rule 411 falls comfortably within this broad grant of power.

Other MPSC rules reflect this principle. For example, the City asserts that the MPSC's rules have no effect on customers like Benjamin's Hope. (City Resp to Appl 16-17.) If correct, the City's position would also require this Court to invalidate other MPSC rules, such as those that require customers to pay for temporary services and that prohibit customers from tampering with electric facilities. See Rules 408 & 409(1).

The Court need not reach such a drastic result. That is because the MPSC's acknowledged lack of "jurisdiction" over a municipal utility, e.g., MCL 460.6(1); MCL 460.10y(11); MCL 460.54), hardly means that the MPSC's rules and decisions have no impact on individuals and entities outside that jurisdiction. This Court similarly lacks jurisdiction over Benjamin's Hope, because Benjamin's Hope is not a party to this litigation. But Benjamin's Hope will be affected by this Court's ruling every bit as much as the City and Consumers Energy.[1]

The remaining reasons that Consumers Energy advances in support of upholding its right of first entitlement are set forth at length in the Application for Leave to Appeal and the Reply Brief supporting the Application. In sum, it cannot possibly be outcome determinative that the *Great Wolf Lodge* case was filed by the customer and this case was filed by the poaching municipal utility. If that procedural difference is all that is required to circumvent this Court's holding in *Great Wolf Lodge*, then *Great Wolf Lodge* has been rendered a nullity. The Court of Appeals' ruling deprives Consumers Energy's Michigan customers of their investment in the electric facilities that already served the property, burdens the City's other customers with the cost of extending the City's facilities to service Benjamin's Hope, and welcomes municipal-utility poaching that will similarly burden Michigan citizens in the future. The Court of Appeals should be reversed.

[1] One aside: The Court in *Great Wolf Lodge* did divide over whether a regulated-utility customer remains so when all the buildings on the subject property have been demolished. See 489 Mich at 46 (Markman, J, concurring in part and dissenting in part). That division is irrelevant here. It is undisputed that Consumers Energy has provided electric service to the subject parcel since 1939. It is undisputed that Consumers Energy was providing electric service to a building on the parcel at the time Benjamin's Hope asked Consumers Energy to discontinue service. And it is undisputed that there were other buildings on the parcel that Consumers Energy could have served at the time it honored its customer's request. In fact, those were the very buildings the City began servicing seven days later after it spent $65,000 to create the duplicate facilities necessary to connect the buildings to the City's service network. (Koster Aff ¶ 17.) The fact remains that not a single Justice in *Great Wolf Lodge* questioned Rule 411(11)'s effect on customers, despite the fact that customers are not regulated utilities and therefore not subject to the MPSC's regulatory "jurisdiction."

C. The City's *amici* raise red herrings.

The City's *amici* list a parade of horribles that will follow if this Court's decision in *Great Wolf Lodge* is not overturned. According to *amicus* ABATE, "Consumers argues that if it is the first 'utility to serve in an area, it has the absolute right to do so in perpetuity, no matter what." (ABATE Br 4.) ABATE further states that "[u]nder Consumers' interpretation, whether Rule 411 is applicable is no longer the option of the municipal utility; it is the option of the PSC-regulated utility." (*Id.* at 10 n 8.) Not so.

Nowhere has Consumers Energy argued that if it is the first-serving utility in an area, it has an absolute right to continuing serving that *area* to the exclusion of all other utilities. This dispute is about whether Consumers Energy can continue serving a particular *customer*, not a subdivision, township, village, or other "area." Nor has Consumers Energy suggested that municipal utilities no longer get to decide whether they will be subject to the MPSC's jurisdiction. Consumers Energy has argued only that Rule 411 means what it says: a regulated utility has the right to serve a customer's entire load and allows a regulated utility to vindicate its right.

ABATE also argues that Consumers Energy's argument results in a situation in which "a municipal utility can *never* win competitive skirmishes under Rule 411 . . . because a municipal utility is not a 'utility' " under Rule 411 and, therefore, cannot benefit as the first utility to serve a premises. (ABATE Br 12-13.) But a municipal utility can be a utility for purposes of Rule 411 if it chooses under MCL 460.10y(3) to operate in compliance with Rule 411. And if a parcel has always been vacant, with no buildings or facilities (i.e., customer) to serve, there is no first-serving utility and a municipal utility could fill that gap. Finally, it makes sense that regulated and municipal utilities are treated differently. The former have a legal obligation to serve all properties, and thus the state's policy choices favor them with a right of first entitlement. There is nothing untoward about enforcing state policy embodied in a rule and statute.

The Michigan Municipal Electric Association Brief contains a similar parade of horribles. If *Great Wolf Lodge* means what it says, the Association asserts, true customer choice "will be eliminated" and "head-to-head competition will be eliminated." (MMEA Br 6.) Further, says the Association, allowing *Great Wolf Lodge* to stand will mean that the "constitutional and statutory system governing municipal utilities will effectively be amended or even repealed" by an MPSC rule. (*Id.*) Again, these panicked claims fail.

First, Michigan does not have a pure free-choice system in the utilities context. Rule 411 and MCL 124.3 exist to avoid duplication of the electric grid and to protect customers whose hard-earned money has facilitated the construction of Michigan's utility network. That these rules and statutes exist is evidence that Michigan has made a policy choice to eliminate a pure head-to-head competition between utilities. If the Association wants a different system, its remedy is with the Legislature, not the courts.

Second, it is sophistry to argue that an MPSC rule is amending or repealing state constitutional and statutory law. As Holland admitted in its initial briefing "[u]nder Michigan law, a municipal utility is permitted to provide electric service anywhere in areas adjacent to the city *except as prohibited by law*." (City Resp Br 1 (emphasis added).) If a municipal (or for that matter, a regulated) utility attempted to supply electricity in a way that violated a neighboring local government's zoning laws, or the State's environmental laws, those laws would undeniably circumscribe the utility's authority. The situation is no different here. The *amici*'s arguments are simply red herrings that this Court should reject.

II. MCL 124.3 also prohibits the City from providing service to Benjamin's Hope.

MCL 124.3 provides a separate reason to prevent the City from poaching Consumers Energy's customers without consent. That provision states:

> A municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits *already receiving* the service from another utility unless the serving utility consents in writing. [MCL 124.3(2) (emphasis added).]

The City of Holland is a municipal corporation seeking to render electric delivery service to Benjamin's Hope—a customer outside the City's corporate limits that was already receiving the service from Consumers Energy, which has not consented to that poaching, in writing or otherwise. The Court of Appeals' published decision renders MCL 124.3 nugatory, providing a second, independent reason for this Court to reverse and clarify the law.

The Court of Appeals focused on the phrase italicized above—"already receiving"—and concluded that to have the right of first entitlement, Consumers Energy was required to be presently delivering service to a customer. And because Consumers Energy—at the property owner's instruction—shut off service to one building on the subject property, MCL 124.3(2) was no obstacle to Holland providing its own electric service to the same property (different building) a mere seven days later.

This interpretation does not represent "the manifest intent of the Legislature." *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999). Otherwise, one must assume that the Legislature intended a utility's right of first entitlement to be rendered inoperable solely at the option of the customer, who can simply request that electric service be shut off at any time. Rule 411 and MCL 124.3(2) may not prevent *all* duplicative electric facilities (City Resp Br 19), but this Court should not interpret them in such a way that they are incapable of preventing *any* duplication.

The Court of Appeals' opinion also rewrote other pertinent language regarding the definition of "customer." MCL 460.10y(2) defines "customer" to include not only a "building" served by an electric provider, but also "facilities" so served. To give the term "facilities" purpose, it must mean something more than simply a "building." *Duffy v Michigan Dep't of Natural Res*, 490 Mich 198, 215; 805 NW2d 399 (2011) ("It is axiomatic that 'every word [in the statute] should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory.' ") (quoting *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011)). And the dictionary supports that notion, as explained at pages 14-15 of the Application for Leave to Appeal. So for purposes of MCL 124.3(2), the whole of the Riley Street property was a "facility," as this was the *place* established by Benjamin's Hope to provide its services. In other words, the property was Benjamin Hope's establishment, operated with the goal of providing the organization's services. The "CL Construction trailer" was decidedly *not* the facility. (Contra Slip op at 5.) And it is undisputed that Consumers Energy was the only utility serving the parcel from 1939 through April 2012.

In sum, Rule 411(11) prohibits the City's conduct here, but so does MCL 124.3. Contrary to the statute, the City propositioned a current customer of Consumers Energy that was located outside the City's corporate limits, built entirely duplicative electric facilities to connect that customer to the City's network at considerable cost to the City's other customers, and then began rendering electric service to that customer, all without obtaining (or even seeking) Consumers Energy's consent. MCL 124.3(2) prohibits a municipal utility from engaging in that very action. This Court should separately grant the application to correct the Court of Appeals' erroneous—and now binding—reading of MCL 124.3.

CONCLUSION AND REQUESTED RELIEF

The City of Holland and its *amici* ask this Court to overrule *Great Wolf Lodge* and render Rule 411 and MCL 124.3 a practical nullity. The Court should grant the application but decline that invitation. The Court should instead make clear that the rights bestowed by Rule 411 and MCL 124.3 are not toothless, and they cannot be circumvented by a scheming municipal utility and customer. In other words, the Court's ruling in *Great Wolf Lodge* applies equally to customers and municipal utilities alike.

Consumers Energy respectfully requests that the Court grant leave to appeal, reverse the Court of Appeals, and enter judgment in favor of Consumers Energy.

Respectfully submitted,

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